

May 9, 2013

Answers to April 30, 2013 Letter from Senator Boxer to EPA Administrator Perciasepe

1) Describe EPA's investigation of the West, Texas facility, including timelines and scope.

EPA Response: Once the property where the former West Chemical & Fertilizer Co was located has been released by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) (since the cause of the accident was unknown and could have been a deliberate release, ATF had initial authority over the site and investigation), the Regional Risk Management Program (RMP) inspectors will visit the facility to conduct further investigations in coordination with other Federal Agencies. We will evaluate all available records and interview transcripts with regard to the 112(r) program.

2) Why is ammonium nitrate not on the list of covered chemicals that facilities must report to EPA under the Risk Management Program?

EPA Response: The Agency developed criteria for listing toxic and flammable chemicals and specified substances on the list of covered chemicals under the Risk Management Program (the "RMP list") after notice and comment rulemaking (59 FR 4478, January 31, 1994). In this rule, EPA also listed Division 1.1 explosives - a category of high explosives defined by Department of Transportation (DOT) classification. Ammonium Nitrate (AN), when produced in its most explosive form intended for use as an explosive, meets Division 1.1 criteria. Ammonium nitrate fertilizer does not meet Division 1.1 criteria and would not have been regulated under the original RMP list rule.

The Institute of Makers of Explosives ("IME") petitioned for judicial review challenging the listing of high explosives (*IME v. EPA*, D.C. Cir. No. 94-1276). Among IME's objections to the rule, it argued that existing regulations by the ATF, DOT, Mine Safety and Health Administration (MSHA), and Occupational Safety and Health Administration (OSHA) already adequately regulated DOT Division 1.1 explosives. In a settlement with IME, the Agency agreed to propose delisting explosives and IME agreed to undertake certain measures to enhance local emergency response and dismiss its case if EPA ultimately delisted high explosives (61 FR 13858, March 28, 1996). The measures IME agreed to are discussed in the preamble to the proposed rule to delist high explosives (61 FR 16598, April 15, 1996) and in the preamble to the final rule delisted high explosives (63 FR 640, January 6, 1998).

3) Please provide a list of all chemicals regulated through the Risk Management Program under Section 112(r) and the types of uncovered chemicals EPA could add to the list or otherwise address under the general duty clause of Section 112(r).

EPA Response: The RMP rule covers 77 toxic and 63 flammable substances and mixtures at specified threshold quantities and concentrations (see 40 CFR Part 68.130, <http://www.gpo.gov/fdsys/pkg/CFR-2011-title40-vol15/xml/CFR-2011-title40-vol15-sec68-130.xml>). Clean Air Act Section 112(r)(3) gives EPA authority to list substances "which, in the case of an accidental release, are known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health or the environment." Section 112(r)(3) also named 16 specific substances to be listed and required EPA to

include at least 100 substances which pose the greatest risk of causing death, injury, or serious adverse effects to human health or the environment from accidental releases into the air. EPA is prohibited from including on the list any air pollutant for which a national primary ambient air quality standard has been established, except anhydrous sulfur dioxide, which the statute required EPA to list. In listing substances, CAA Section 112(r)(4) requires EPA to consider specific factors including the severity of any acute adverse health effects associated with accidental releases of the substance, the likelihood of accidental releases of the substance, and the potential magnitude of human exposure to accidental releases of the substance. There are limits on EPA's authority to cover flammable substances in certain instances and, as stated above, the agency may not regulate CAA title VI pollutants. Within the forgoing constraints, EPA has authority to add substances to the RMP list via notice and comment rulemaking.

The Section 112(r)(1) General Duty Clause applies to all substances listed under Section 112(r)(3) and any other extremely hazardous substance. The CAA does not define the term extremely hazardous substance, but the legislative history of the Clean Air Act suggests criteria which EPA may use to determine if a substance is extremely hazardous. The Senate Report stated the intent that the term "extremely hazardous substance" would include any agent "which may or may not be listed or otherwise identified by any Government agency which may as the result of short-term exposures associated with releases to the air cause death, injury or property damage due to its toxicity, reactivity, flammability, volatility, or corrosivity" (Senate Committee on Environment and Public Works, Clean Air Act Amendments of 1989, Senate Report No. 228, 101st Congress, 1st Session 211 (1989)).

4) Provide me with a list of all chemicals that facilities are required to report to state and local emergency planning authorities but are not required to report to EPA.

EPA Response: Under the Emergency Planning and Community Right-to-know Act (EPCRA), there are two (2) sections where information is provided to state and local emergency planning authorities but not to EPA. Those sections are section 302 of the Emergency Planning and Notification Subtitle and sections 311/312 within the Community Right-to-Know Reporting Requirements Subtitle. Under section 302, a facility that has an Extremely Hazardous Substance (EHS) on-site at or above its Threshold Planning Quantity (TPQ) must notify the State Emergency Response Commission (SERC) and Local Emergency Planning Committee (LEPC), as well as participate in local emergency planning activities. That list of chemicals is found here: <http://www.gpo.gov/fdsys/pkg/CFR-2012-title40-vol29/pdf/CFR-2012-title40-vol29-part355-appA.pdf> (alphabetical order) or <http://www.gpo.gov/fdsys/pkg/CFR-2012-title40-vol29/pdf/CFR-2012-title40-vol29-part355-appB.pdf> (CAS No. order).

Sections 311/312 establish the community right-to-know requirements in order to ensure information on chemicals in the community is provided to help communities prepare for and respond to chemical accidents. Under these sections, facilities that have either: (1) a hazardous chemical present at or above 10,000 pounds; or (2) an EHS present at or above its TPQ or 500 pounds—whichever is the lesser, are required to submit an Emergency and Hazardous Chemical Inventory form (Tier II) and a Material Safety Data Sheet (MSDS) for that chemical to their SERC, LEPC, and local fire department. A chemical is hazardous if defined as such under the Hazard Communication Standard (HCS) of the Occupational Safety and Health Act (OSHA). There is not a single comprehensive list of all the hazardous chemicals

covered. If a facility is required by OSHA to develop and/or maintain a MSDS for that chemical and it is present at or above the threshold discussed above, it must be reported.

5) How many facilities fall under Sec. 112(r) of the Clean Air Act and where are they located?

EPA Response: Approximately 12,800 facilities are currently covered by the 40 CFR Part 68 Risk Management Program regulations. EPA knows the identity and location of these facilities because they are required to submit a risk management plan (RMP) to EPA. Facilities covered by the General Duty Clause of CAA Section 112(r)(1) are not required to register with EPA (unless they are also subject to 40 CFR Part 68). RMP facilities are located in all 50 states and the District of Columbia, as well as the U.S. territories of Puerto Rico, the U.S. Virgin Islands, and Guam.

6) How often are those covered facilities inspected by EPA officials?

EPA Response: EPA inspects approximately 500 RMP facilities each year in 42 states and 3 territories, including approximately 150 high-risk facilities. EPA has granted a delegation of authority to implement the Section 112(r) Risk Management Program to 8 states (Ohio, Delaware, New Jersey, North Carolina, South Carolina, Florida, Georgia, and Mississippi) and 5 counties (Forsyth, NC, Buncombe, NC, Mecklenburg, NC, Jefferson, KY, and Allegheny, PA). State or local implementing agency officials conduct inspections at RMP facilities within these delegated jurisdictions, while EPA officials conduct RMP inspections in all remaining states and territories. High risk facilities are identified using the RMP National Database and include facilities that have had serious accidental releases of regulated substances, facilities that have more than 100,000 people in their worst-case release scenario zone, and facilities that have extremely large quantities or numbers of regulated substances on site. High risk facilities receive a higher inspection priority than other RMP facilities and EPA devotes more inspection resources (i.e., people and time) to high-risk facility inspections. Based on the number of facilities and current resources, high-risk RMP facilities would be inspected approximately once every 11 years, and non high-risk RMP facilities would be inspected approximately once every 28 to 30 years, although circumstances may cause certain facilities to be inspected more frequently.

7) Who at EPA has lead responsibility for Sec. 112(r) of the Clean Air Act, and how does EPA ensure oversight is regularly conducted at covered facilities.

EPA Response: The Office of Emergency Management (OEM) within EPA's Office of Solid Waste and Emergency Response (OSWER) is the lead headquarters program office for implementation of CAA Section 112(r), and the Office of Civil Enforcement within the Office of Enforcement and Compliance Assurance (OECA) is the lead headquarters office for civil enforcement of section 112(r). The EPA regions also play a key role. They deploy inspectors to regulated facilities to monitor compliance with the RMP and GDC requirements. OSWER, OECA, and the Regions work together closely on this program to develop and implement regulations and policy, carry out inspections and conduct enforcement at covered facilities.

Several activities by EPA ensure oversight of RMP facilities, including:

- EPA operates and maintains the RMP reporting system and the RMP National Database. RMP*eSubmit is EPA's internet-based system for electronic submission of risk management plans. Covered facilities electronically submit, update, and if necessary deregister their RMP with EPA. The submission system contains a number of automated data validation checks to ensure that RMPs meet minimum data quality criteria before they can be submitted. RMP submissions are electronically collated into the RMP National Database. Using this database, EPA can review and audit RMPs and conduct various analyses to identify high risk facilities and target facilities for inspections or information requests.
- EPA oversees 8 delegated state and 5 delegated local agency programs to ensure that delegated agencies also carry out inspections and enforcement at RMP facilities. EPA also provides support to delegated agencies through grants or cooperative agreements, training, and inspection or case development support when requested.
- EPA conducts a comprehensive inspector training program to ensure that all EPA and delegated agency inspectors have received appropriate inspection training.
- EPA conducts additional compliance monitoring, compliance assistance, and oversight activities such as RMP audits, information request letters, industry association presentations, training workshops and seminars.
- If after an inspection or as the result of an information request letter, EPA determines that a facility is out of compliance with the RMP rules or the CAA Section 112(r)(1) General Duty Clause, the Agency may take an enforcement action. Enforcement actions include administrative penalty orders, administrative compliance orders, civil judicial cases, and criminal cases.

EPA's combined annual budget for the CAA Section 112(r) and EPCRA programs is approximately \$14 million. That amount funds all headquarters and regional full-time equivalent (FTE) staff, associated headquarters and regional contracts, operation of the RMP Reporting Center (which includes operation of the RMP submission system, RMP National Database, and related software applications), inspector training, and all facility inspections. There are approximately 40 FTE which conduct RMP inspections nationwide.

8) Describe any and all fines issues against the West facility for failing to comply with safety standards related to chemicals.

EPA Response: EPA Region 6 conducted an RMP inspection at the West Chemical & Fertilizer Co. on March 16, 2006. The inspector observed the processes and the equipment at the facility, and reviewed the facility's RMP and associated records. The inspector identified the following violations:

- timely update the RMP (the update due on 2004 had not been submitted), including updating the Hazard Assessment and Hazard Review,
- include consequences of deviation in operating procedures,

- properly document new operator training,
- develop a formal mechanical integrity program, and
- failure to conduct compliance audits.

In accordance with the EPA approved penalty policy in place in 2006, on June 5, 2006, the Region issued a proposed Expedited Settlement Agreement (ESA) which assessed a penalty of \$2,300 to West Chemical & Fertilizer Co. The company submitted its updated RMP on July 7, 2006 and paid the penalty. The Agency issued the final ESA on August 14, 2006.

No other actions have been taken by EPA against this company for this facility.

9) Explain how EPA works with other agencies at the local, state, and federal level to plan for accident prevention.

EPA Response: Besides working with delegated states and localities as described above, on a state and local level, EPA coordinates and collaborates on a continuous basis with the National Association of SARA Title III Program Officials (NASTTPO). Bi-annually we meet with all NASTTPO members to discuss key and emerging issues related to the EPCRA and RMP programs. Additionally, throughout the year we exchange information and provide technical assistance to the States and locals to support them in implementing the EPCRA program.

On a federal level, we have a good working relationship with key federal agencies involved in chemical safety, including OSHA, DHS, Chemical Safety Board (CSB), and DOT. As part of our collaboration and coordination with these agencies, we meet regularly or as issues arise to discuss areas of overlap in our programs and how to work together to better implement our respective programs and promote chemical safety.

10) Describe how EPA can ensure that information about chemical accident prevention and emergency response could be distributed more widely to responsible authorities, including through electronic databases.

EPA Response: All information reported by facilities under the EPCRA program (except for Section 313: Toxic Release Reporting (TRI)) is reported directly to the state and local responsible authorities, including the State Emergency Response Commissions (SERCs), Local Emergency Planning Committees (LEPCs), and local fire departments. EPA does not get or receive any EPCRA information except for the information submitted to the Agency under Section 313: TRI. With regard to access to the RMPs facilities submit under the RMP program, state and local responsible authorities can either request a copy of the RMP database on a CD from the EPA or they can request direct secure internet-based access to the RMP database by registering for an on-line Central Data Exchange (CDX) account.

EPA also considered making a portion of the RMP database available via EPA's public website. However, due to comments received from members of Congress and several federal agencies, including DHS,

expressing concern that providing such data on-line may pose a threat to national security, EPA decided not to proceed.

Additionally, there is a database known as E-Plan (Hazmat Emergency Management Information System) which is managed by the University of Texas at Dallas (UT Dallas) and provides facility and hazardous material information to first responders. In addition to Tier II (Hazardous Chemical Inventory) data, E-Plan contains other information such as maps of the area surrounding a fixed facility, Facility Emergency Response Plans, RMPs, Federal Area Contingency Plans, facility diagrams and building floor plans, and MSDSs.

The data system has expanded over time and currently contains records for over 350,000 Tier II facilities in 36 states, all RMPs submitted in 50 states, the District of Columbia, and three US territories, and 24,673 of the most common hazardous chemicals in use in the U.S. More than 4,900 emergency personnel have been trained as authorized E-Plan users in 45 states. While EPA provided some financial support initially to assist emergency responders in getting better access to this information, E-Plan has been financially supported by UT Dallas and DHS. However, beginning October 2013, DHS will no longer be able to provide its share of funding, so the viability of E-Plan remains uncertain.